No. 22,081

IN THE

United States Court of Appeals

For the Ninth Circuit

KAREN JEAN HYMER,
Appellant,

vs.

BENJAMIN K. CHAI, and
VICTORIA LEILANI CHAI,
Appellees.

Upon Appeal from the United States District Court for the District of Hawaii

REPLY BRIEF OF DEFENDANT-APPELLANT

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Subject Index

Table of Authorities Cited

Cases

Rules

Statutes

Texts

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1. THE TRIAL COURT ERRED IN ALLOWING THE LOSS OF CONSORTIUM CLAIM OF PLAINTIFF'S WIFE TO PROCEED TO JUDGMENT.

The plaintiff, Victoria Chai, contends that her claim for loss of consortium is one of "pendent jurisdiction", citing *Morris v. Gimbel Bros., Inc.,* 246 F. Supp. 984 (E.D. Pa. 1965) as authority. The citation of this case, and others in the same line (Ans. Br. p. 6) are inapplicable to the facts of the present case in two respects: (1) There is no Hawaii Statute allowing the recovery for loss of consortium by a wife; (2) Even if Hawaii had such a statute, a per-

sonal injury action for damages for injury sustained, and an action by the injured person's spouse for loss of consortium, are two separate and distinct actions and ancillary jurisdiction would not suffice to boost the wife's claim over the jurisdictional limit.

Each of the cases cited by the plaintiff in support of "pendent jurisdiction" involves a situation where the legitimacy of the ancillary cause of action is undisputed. Such is not the case here—Hawaii's law does not allow the recovery for loss of consortium by a wife (Open. Br. pp. 30, 34-36) and thus the argument of "pendent jurisdiction" is irrelevant—there is no ancillary cause of action to be joined. *Morris v. Gimbel Bros., Inc.,* supra, can thus be distinguished by the fact that Pennsylvania has such a cause of action. An additional distinguishing feature of no small import is the presence in *Morris* of a strong Pennsylvania policy of unique dimensions, which is well-stated in *Wilson v. American Chain & Cable Co.,* 364 F2d 558, 564 (3d Cir. 1966) (Ans. Br., pp. 8-9):

> "In cases of this kind where parent and child or husband and wife are claimants, Pennsylvania statutes for many years have required that the 'two rights of action shall be redressed in only one suit, brought in the names of the parent and child [or the husband and wife].' (citations omitted) These statutory requirements have been continued under the rule-making power in the Pennsylvania Rules of Civil Procedure (Rule 2228), 12 P.S. Appendix . . . We give recognition to this policy of Pennsylvania in treating

> the father's claim as pendent to that of the minor. Indeed the father is the party plaintiff in both claims."

Hawaii has neither the cause of action involved nor a comparable policy to Pennsylvania and thus the citation of the line of cases exemplified by *Morris* has no application to the facts of the present case.

A personal injury action for damages and an action by the injured person's spouse for loss of consortium constitute two separate and distinct actions. *Campbell v. City of Atlanta,* 277 FSupp 395, 396 (N.D. Ga. 1967), a removal proceeding involving a husband's action for personal injuries and a wife's claim for loss of consortium which did not meet the jurisdictional amount requirement, illustrates this well in a direct confrontation with the pendent jurisdiction argument.

> ". . . Before jurisdiction of one question clearly within the jurisdiction of a federal court, can carry with it pendent jurisdiction over another clearly not within it, the relationship between the two must be such that, in reality, only one 'Constitutional case' is involved.
>
> Applying this test in the present case, it is clear that here more than one case is involved. This is true since, under Georgia law, the two causes of action, one by the husband and one by the wife, are not the same. Also under Georgia law consolidation could not be compelled, no privity would exist between the plaintiff husband and the plaintiff wife, and a judgment in one of the cases would not be res judicata as to the other. (citation omitted)

> We are aware that several of the cases previously cited, notably those from the Third Circuit, have retained cases not otherwise cognizable in federal court on the basis of pendent jurisdiction and under circumstances quite similar to those here involved. See *Borror v. Sharon Steel Co.* and *Morris v. Gimbel Bros., Inc.,* both supra. These cases rely heavily, however, on a Pennsylvania statute (later a rule of court) affirmatively requiring such companion cases to be either sued jointly or consolidated for trial . . ."

Plaintiff's claim that the policy of Hawaii law is to encourage wrongful death and survival actions to be brought in one action is irrelevant, since unlike the present case the same injuries are involved and the damages recoverable in one suit are complementary to those recoverable in the other.

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2. IT WAS PREJUDICIAL ERROR TO EXCLUDE EVIDENCE OF PRIOR MANNER OF DRIVING.

The plaintiff has failed to rebut any of the allegations made in point 2 (Open. Br., pp. 7-12, 31, 37-39) and thus they must be deemed uncontroverted. The plaintiff weakly claims that because he was in one lane of travel for approximately 1/10 of a mile before the accident occurred evidence of his negligence moments earlier is somehow "too remote", and cites 46 ALR2d 9, 13 (1958), as authority. Such reasoning is even more curious when one reads the annotation cited, for it says nothing of the kind and,

in fact, would seem to be favorable to the defendant's position.

It is important to note that the evidence in dispute here was not offered to prove a speeding violation, or any other specific violation of the law, but merely to help forge a chain of actions showing that the party was driving his motorcycle in a reckless manner at the time of the accident, and secondarily, to test his credibility. (§§ 13, 14, 18 of 46 ALR2d are of particular interest.) The exclusion of such evidence was highly prejudicial to defendant's right to prove contributory negligence or assumption of risk by the plaintiff.

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3. TRIAL COURT ERRED IN EXCLUDING PORTION OF DEPOSITION, WHERE SAID PORTION RELATED TO PLAINTIFF'S AWARENESS OF TRAFFIC AND CREDIBILITY AS A WITNESS.

The language of Rule 26(d) F.R.C.P. is clear as to the admissibility of depositions to test the credibility of the witness at the trial where inconsistencies exist between the deposition and the testimony offered in trial. As stated in *Cleary v. Indiana Beach, Inc.*, 275 F2d 543, 550 (1960), cert. den. 364 US 826, 81 S.Ct. 62, 5 LEd2d 53:

> "After plaintiff had testified on direct and cross-examination, the court admitted in evidence, and permitted defendant to read to the jury portions of plaintiff's pre-trial deposition. That ruling was not error but was in accordance with the provisions of Fed. R. Civ. Proc. 26(d)(2), which permits the deposition of a party to be used by

an adverse party for any purpose." [See also, *Pfotzer v. Aqua Systems,* 162 F2d 779 (1947)].

The plaintiff cites *Pursche v. Atlas Scraper & Engineering Co.,* 300 F2d 467 (9th Cir. 1962), a case clearly distinguishable from the case on hand. In *Pursche* the defendant was trying to offer the deposition of the plaintiff en masse as original evidence. Such is not the situation in the present case, in which the defendant sought only to point out the inconsistencies in the plaintiff's testimony in his deposition and at the trial. Furthermore, the cases can also be distinguished by the fact that the *Pursche* court indicated that it would have ruled differently if the failure to admit the deposition resulted in prejudice to the defendant's case, but that the defendant never offered to prove that the plaintiff's testimony at the trial fell short of the deposition (300 F2d at 488, 489).

Defense counsel in the present case made an offer of proof and clearly warned of the prejudice resulting from the exclusion of inconsistent statements in his attempt to prove contributory negligence (Tr. pp. 432-434). It cannot be challenged that the plaintiff's visibility in the intersection was essential to the issue of contributory negligence, and, in fact, the plaintiff has not denied it.

The claim that certain highly important questions and answers (Tr. pp. 432-434) were unintelligible and confusing is inconsistent with the fact that the plaintiff himself drew the exhibit from which he

testified, and the fact that the jury had access to such exhibit. The transcript (Tr. pp. 283-322) shows that the plaintiff clearly understood the question. The claim that defense counsel failed to correlate the two exhibits relating to the plaintiff's conflicting testimony is superfluous; defense counsel was never given a chance to correlate them (Tr. 432-434), and thus the jury was deprived of their right to judge the credibility of the plaintiff's testimony.

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4. IT WAS PREJUDICIAL ERROR TO DENY NEW TRIAL AFTER IMPROPER COMMUNICATIONS WITH THE JURY.

An analysis of plaintiff's citation of authority (Ans. Br., p. 22) for the proposition that "it is not misconduct if the conversation is on subjects which are unrelated to the case" is quite revealing. The cases cited within the general encyclopedia citation (89 CJS Trial, § 457f., p. 86) contain quite different fact situations from the present case.

In *Owings v. Webb's Ex'r.,* 202 SW2d 410 (Ky. Ct. of App. 1947), the improper communication consisted of the clerk of court, during recess, conversing separately with two jurors concerning where a corn shredder was then operating in the community and where they would eat lunch that day. And in *Jardine Estates v. Donna Brook Corp.,* 162 A2d 372 (NJ Super. Ct. 1956), the improper communication consisted of the bailiff's entry into the jury room twice to retrieve coats of extra jurors and find a missing wallet. The defendant readily agrees that

communications of this nature, though improper, may not constitute reversible error, but that the facts of the present case are clearly distinguishable.

It is submitted that the proper law to be applied is that of *Panko v. Flintkote Co.,* 80 A2d 302 (NJ 1951), in which the facts are much more similar to the present case. In *Panko,* a brother-in-law of one of the jurors placed a telephone call to an officer of the defendant corporation and inquired as to the amount of liability insurance carried by the defendant. Shortly after determining that the insurance coverage was $250,000, the jury returned a $60,000 verdict for the plaintiff. In reversing this judgment, the New Jersey Supreme Court discussed at length the right of a party to an action to have jurors free from improper influences, pointing out that the test for determining whether a new trial will be granted due to improper communications is whether the irregular matter had the capacity to influence the result, nor whether actual influence resulted. The court then discussed the prejudicial effect of the communications regarding the insurance coverage.

> ". . . If knowledge of the amount of the insurance influenced the juror in question there was not a fair trial. Furthermore, it is impossible to say what influence the argument and personality of that juror, motivated by such knowledge may have exerted upon his fellow jurors during their deliberations, even if he did not disclose the amount of the defendant's insurance coverage. We think, however, it was a factor which entered into the result although we express no opinion

> as to whether or not the verdict is excessive because of our view that there must be a new trial. In order that there may be confidence in trial by jury it is necessary that parties are to feel sure that verdicts are based upon honest consideration of the evidence and not upon prejudice or sympathy." [80 A2d at 306; see also *Butters v. Wann,* 363 P2d 494 (Colo. 1961)]

Plaintiff's contention that there is no factual basis to support a finding that the improper conversation affected the trial "in any way" is equally untenable. The nature of the questions as to the possible effect of the juror's failure to agree on a verdict, and as to the effect upon litigation if one of the parties were an insurance company, indicates that the jury was deadlocked at the time the questions were asked, and gives rise to the implication that the answers afforded by the bailiff were material to the ability of the jury to reach a verdict (Open. Br., pp. 42-44).

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5. IT WAS PREJUDICIAL ERROR TO DENY MOTION FOR NEW TRIAL AFTER A VERDICT NOT SUPPORTED BY THE EVIDENCE.

Throughout the trial and continuing in his appellate brief, the plaintiff has sought to free himself from contributory negligence as to speed by emphasizing that he was within the posted speed limit of 35 m.p.h. The plaintiff fails to realize a basic principle of negligence law, i.e., that compliance with a statutory standard of conduct is not necessarily due care (Prosser, Law of Torts § 35 (1964)). The language of

the Honolulu Traffic Code § 15-7.1 (1965) is particularly relevant:

> "(1) No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and without regard to the actual and potential hazards then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle, or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care."

Thus the plaintiff's admission that he was travelling at 32 m.p.h. (35 m.p.h. limit) as he entered a busy intersection (Tr. pp. 257-258), and his further admission that traffic conditions were of a heavy, stop and go nature (Tr. p. 26) were extremely important to the defendant's efforts to prove contributory negligence. The posted limit was intended to serve as a maximum limit under ideal conditions, and such conditions were absent at the time of the collision in question.

The plaintiff has also failed to deny or impeach the testimony of witness Lawrence on the question of speed (Tr. pp. 149, 153, 154) conclusively proving that the plaintiff entered the intersection at an unreasonable and imprudent rate of speed under the circumstances of heavy, stop and go traffic.

In addition to the unreasonable rate of speed, the defendant showed that plaintiff was unable to see into the intersection while travelling at such speed, and

had failed to notice that traffic had come to a complete stop when he entered the intersection.

The landmark case in Hawaii as to contributory negligence is *Ferrage v. Honolulu Rapid Transit & Land Co.,* 24 Haw. 87 (1917), wherein the court stated:

> "The duty to observe ordinary care requires that the driver of an automobile must anticipate the possibility of meeting pedestrians or other vehicles at street crossings and have his machine under such control as may be necessary to avoid collision. . . . The evidence clearly showed that the plaintiff approached the street intersection at an excessive rate of speed, and without attempting to slow down until the street car came into view, so that it was impossible for him to either stop or turn his car so as to avert the collision. That was negligence as matter of law, and the jury could not have said that it did not contribute to the injury."

It is submitted that, upon the evidence of plaintiff's speed, lookout, and reckless manner of driving his motorcycle moments before the impact, taken as an entity, a jury could not legally find that the plaintiff's conduct did not contribute to, if not a sole cause of, his injuries. Thus, contributory negligence as a matter of law should have been found, and in its absence, a new trial should have been granted on grounds of insufficient evidence to support a verdict.

6. THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR MISTRIAL AFTER PLAINTIFF'S COUNSEL IMPROPERLY QUESTIONED DEFENDANT AS TO A CRIMINAL CONVICTION FOR TRAFFIC VIOLATION ARISING FROM THE SAME FACTS AS THEN BEFORE THE JURY.

Plaintiff's brash accusation that defense counsel is unable to distinguish between the principles of admission and credibilty of evidence law shows a misunderstanding of the defendant's position and of the meaning of § 222-22, Revised Laws of Hawaii (1955), which provides that:

> "A witness may be questioned as to whether he has been convicted of any indictable or other offense; and upon being so questioned if he either denies the fact or refuses to answer, it shall be lawful for the party so questioning to prove such a conviction."

Upon the basis of this statute, plaintiff's counsel asked defendant, in the presence of the jury, whether or not she had been convicted of a traffic violation arising out of the accident at issue. The court properly sustained an objection to the question based on the fact that the question was intended to induce an admission and that defendant had entered a plea of *nolo contendere* to the traffic charge, which plea does not constitute a conviction.

Furthermore, even if the plaintiff were only testing defendant's credibility, the question still would not be sanctioned by § 222-22, since that section was not intended to, nor has it ever been stretched beyond reason to include a traffic plea within the "or

other offense" language of the statute. The credibility of witnesses has been challenged under this statute only in criminal cases and generally has been applied when the prior offense has been a felony, particularly an offense involving moral turpitude. *Territory of Hawaii v. Warner,* 39 Haw. 386 (1952), illustrates this well.[1]

It is submitted that this is conclusive proof that § 222-22 and its statutory predecessors were intended to refer to the impeachment of witnesses at a crim-

[1]The defendant was indicted on five counts charging him with inducing, compelling, and procuring a young woman to practice prostitution and to hold herself out as a prostitute with intent in the defendant to obtain a portion of the gains earned by her as a prostitute, and the court permitted the jury to be informed of the verdict of guilty by a jury in a former case of the same nature against the defendant in which a motion for a new trial was then pending. After much discussion over the meaning of "conviction" in the statute, the Hawaii Supreme Court affirmed the use of the "pimping" conviction to impeach the defendant. The remainder of the Hawaii cases interpreting § 222-22 are presented here, with the nature of the action indicated first, followed by the type of prior conviction used to test credibility of the witness under this statute: *Territory of Hawaii v. Henry,* 39 Haw. 296 (1952) (criminal assault; assault); *Territory of Hawaii v. Shishido,* 39 Haw. 265 (1954) (abortion & abortion); *Territory of Hawaii v. Peter L. Young,* 37 Haw. 150 (1945) (criminal abortion; drunkenness); *Territory of Hawaii v. Wright,* 37 Haw. 40 (1944) (criminal; heedless driving); *The King v. Apuna,* 3 Haw. 166 (1869) (criminal sale of opium; written confession of purchase); *Territory v. Wong Pui,* 29 Haw. 441 (1926) (criminal assault with deadly weapon; confession); *Territory v. Bodine,* 32 Haw. 528 (1932) (criminal intent to rape; prior immoral conduct); *Territory v. Sadao Honda,* 31 Haw. 913 (1931) (criminal assault with intent to ravish; prior police raids); *Territory v. Bansuelo,* 30 Haw. 832 (1929) (criminal carnal abuse of minor; promiscuity); *Territory v. Goo Wan Hoy,* 24 Haw. 741 (1919) (criminal; unknown); *Republic of Hawaii v. Luning,* 11 Haw. 390 (1898) (criminal sodomy; stealing); *Republic of Hawaii v. Saku Tokuji,* 9 Haw. 548 (1894) (criminal arson; assumed name); *Territory of Hawaii v. Boyd,* 16 Haw. 660 (1905) (criminal embezzlement; indictment for same); *Provisional Government of the Hawaiian Islands v. Aloiau,* 9 Haw. 399 (1894) (criminal gaming, unknown).

inal trial, and that, most certainly in the alternative, the phrase "and other offense" was never intended to include a traffic plea of *nolo contendere.* It is also submitted that such prejudice was not cured by the court's instruction (See Open. Br., pp. 48-51).

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7. IT WAS PREJUDICIAL ERROR FOR THE COURT TO FAIL TO CONTROL FINAL ARGUMENTS OF COUNSEL WITHIN BOUNDARIES RECOGNIZED AT LAW.

Plaintiff's assertion as a proposition of law that "since plaintiff had produced positive evidence regarding speed, it was proper in argument to comment that defendant had not" is a gross misstatement of law. An analysis of his cited authority is again quite revealing (Ans. Br. p. 31):

> "The failure of either party to a civil action to examine a *witness equally accessible* to both offers no foundation for a prejudicial inference and is not a proper basis for argument. But the fact one of the parties fails to call a witness who under the circumstances of the case would *naturally be a witness in his behalf* may be commented upon by opposing counsel." (53 Am. Jur. § 475) (emphasis added).

There was absolutely no foundation in the records for an implication that experts were available or even more fundamental, that an expert would have been able to give an opinion under the circumstances of the case. An analysis of the cases listed in support of the general encyclopedic citation also reveals that in each of the cases, comments were allowed on the

failure to appear of an M.D. who first treated the claimant *(Nantron v. General Title & Marble Co.,* 121 SW2d 246 (1938)); a party who failed to testify *(Block v. Rackers,* 256 SW2d 760 (1953)); and a psychiatrist who examined defendant on defendant's request and at the state's expense. In each of these cases the court allowed the comment because of the first-hand knowledge of the material issues which the potential witnesses had and, equally important, the potential witnesses were shown to have been readily available and "natural" witnesses in the cases. The Missouri Supreme Court well stated the matter in *Block v. Rackers,* supra:

> "Further, it is well settled that the failure of a party having knowledge of the facts and circumstances vitally affecting the issues on trial to testify in his own behalf, or to call other witnesses within his power who have knowledge of such facts and circumstances, raises a strong presumption that such testimony would have been unfavorable, and damaging to the party who fails to proffer the same. Such failure may be commented upon in argument." (256 SW2d at 764; plaintiff's citation to 5 ALR2d 895 contains only cases with the above circumstances, and hence is not applicable to the present case).

Such is not the situation in the present case: there was no foundation in the record for an implication that any expert had first-hand knowledge of the facts, that such an expert was available, nor even that an expert could have rendered an opinion under the facts of this case. Thus, the plaintiff's comment on

the failure of the defense to produce an expert (Arg.-Tr. Add. pp. 75, 76)—without specifying what type of expert or opinion was called for—was unwarranted, contrary to law, and highly prejudicial, as the jury could not have helped but get the impression that defendant was holding back unfavorable testimony.

Defendant also refutes plaintiff's claim that there is no positive evidence that plaintiff was speeding by citing the plaintiff's admission as to his speed (Tr. p. 257), the nature of traffic (Tr. p. 26), and the witness Lawrence's testimony (Tr. p. 149; Open. Br. pp. 19-21).

As to the plaintiff's impropriety in his final argument in misstating the Hawaii law of right of way, see Open. Br. pp. 52-54.

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8. THE TRIAL COURT ERRED IN REFUSING INSTRUCTION ON THE LAW OF EXERCISING RIGHT-OF-WAY.

The plaintiff does not deny that defendant's requested instruction No. 18 is a correct statement of the law, but rather contends that the content of such instruction was adequately covered in the instructions generally, and that it is not error to deny an instruction adequately covered in a general manner by those given (Ans. Br. p. 35). Such, however, is not the status of the law in Hawaii.

In *Young v. Price,* ..... Haw. ..... (No. 4531, June 7, 1968), the Supreme Court of Hawaii was

faced with this precise issue. In this negligence action, the plaintiff proffered an instruction relating to defendant's duty of care which was a verbatim statement of the law as stated in a recent case. The defendant contended that the statements in plaintiff's requested instruction were fully covered by defendant's separate instructions, which consisted of definitions of negligence, and of ordinary care, and one which stated that the amount of care varies in proportion to the duty of danger present. The court found that it was error for the trial court to refuse to give the plaintiff's requested instruction and stated rationale highly pertinent to the case on hand:

> "Defendant's Instruction No. 10 defines 'negligence', No. 11 defines 'ordinary care' and No. 19 states that the amount of care varies in proportion to the degree of danger present. They are all general instructions. None of the instructions relates to the law of negligence with respect to a hose on the sidewalk, nor the specific duty of defendants to warn or protect pedestrians when a hose is placed across a sidewalk. Where instructions are asked which correctly state the law on any issue presented, it is error to refuse to give them unless the points are adequately covered by instructions given. *It is generally considered error to refuse to give a requested instruction on a given point which is accurate and applicable though the point may have been unequivocally covered by a general instruction which was given.*" (P. 10 of advance sheet) (emphasis added).

The facts of the present case are directly on point. The defendant requested a specific instruction which was a correct statement of the law of right-of-way in Hawaii and based almost verbatim on *Mossman v. Sherman,* 34 Haw. 477 (1938) and *Ferrage v. Honolulu Rapid Transit,* 24 Haw. 87 (1917). The trial court refused to give such instruction, however, and instead gave general instructions defining negligence, ordinary care, proximate cause, and contributory negligence. The court also mentioned right-of-way but did not give the specific rules set forth in *Mossman* and *Ferrage,* supra, and in fact, based its instruction on a fact situation in which a right-of-way question was not even involved! Thus we have a fact situation upon which the law of this jurisdiction is clear, and *Young v. Priee,* supra, should apply.

Dated, Honolulu, Hawaii,
September 26, 1968.

Respectfully submitted,
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